INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement	3
Argument	8
Conclusion	15

CITATIONS

Cases:	
Breard v. *Alexandria*, 341 U.S. 622	15
Head v. *New Mexico Board of Examiners*, 374 U.S. 424	15
Red Lion Broadcasting Co. v. *United States*, No. 2, this Term, certiorari granted, 389 U.S. 968	4, 6, 13, 15, 16
United States v. *Radio Television News Directors Assn.*, No. 717, this Term, certiorari granted, 393 U.S. 1014	4, 6, 13, 15, 16
Valentine v. *Chrestensen*, 316 U.S. 52	15
Constitution and statutes:	
Constitution of the United States, First Amendment	3, 14, 15
Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 73 Stat. 557 (1959), 47 U.S.C. 303, *et seq.*	11
Section 307(a)	3
Section 307(d)	3
Section 308	11
Section 309(a)	3, 11
Section 315(a)	3
Section 326	3

	Page
Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, 15 U.S.C. (Supp. II), 1331, *et seq.*:	
Section 2	3
Section 4	3, 8
Section 5	3, 8
Section 10	3, 10
P.L. 89–156, 79 Stat. 589, *et seq.*, Title II, Public Health Services, Chronic Diseases and Health of the Aged	9
Congressional and miscellaneous:	
H. Rep. No. 449, 89th Cong., 1st Sess.	9
S. Rep. No. 195, 89th Cong., 1st Sess.	9
34 Fed. Reg. 1959	10

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1036

THE TOBACCO INSTITUTE, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 1059

NATIONAL ASSOCIATION OF BROADCASTERS AND WTRF-TV, INC., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 1060

AMERICAN BROADCASTING COMPANIES, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

No. 1067

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, 1a–40a[1]) is not yet reported. The ruling of the Fed-

[1] The petitions in these four cases, all seeking review of the same judgment, have a common appendix volume, which is separately bound.

eral Communications Commission, dated June 2, 1967 (Pet. App. A, 14–17), is reported at 8 F.C.C. 2d 381. The Commission's Memorandum Opinion and Order of September 8, 1967 (Pet. App. A, 37–105), denying reconsideration, is reported at 9 F.C.C. 2d 921, and a further clarifying ruling dated September 21, 1967 (Pet. App. A, 106–108) is reported at 10 F.C.C. 2d 16. The Commission's letter denying the Tobacco Institute's petition for reconsideration of the clarifying ruling (Pet. App. A, 113–115) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1968 (Pet. App. B, 41a–43a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The Commission has ruled, in accordance with its Fairness Doctrine, that broadcasters who carry cigarette commercials are obliged to devote "a significant amount of time" to informing their listeners of the hazards to health which smoking may entail. The petitioners attack this ruling, raising three principal questions:

1. Whether the Commission's cigarette ruling is within the scope of its statutory authority.

2. Whether the ruling is consistent with the First Amendment.

3. Whether the Federal Cigarette Labeling and Advertising Act of 1965, limiting government regulation of cigarette advertising, took away from the Commission whatever authority it otherwise had to issue the ruling.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Sections 307(a) and (d), 309(a), 315(a), and 326 of the Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 73 Stat. 557 (1959), 47 U.S.C. 307(a), (d), 309(a), 315(a), 326; and Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282–284 (1965), 15 U.S.C. 1331, 1333, 1334, 1339, are set forth in Petitioners' Appendix C, pp. 45a–49a.

STATEMENT

These cases arose from a complaint (R. 1–8) filed with the Federal Communications Commission in January 1967 by John F. Banzhaf, III, against WCBS–TV, a television station in New York City owned and operated by Columbia Broadcasting System, Inc. Mr. Banzhaf stated that WCBS–TV had carried numerous cigarette advertisements presenting the point of view that cigarette smoking is "socially acceptable, desirable, manly, and a necessary part of a rich full life," and had denied his requests under the Commission's Fairness Doctrine for time to present an opposing view with respect to the desirability

of smoking cigarettes.[2] CBS replied that it was confident that "its coverage of the health ramifications of smoking has been fully consistent with the fairness doctrine," but doubted in any event that "the fairness doctrine can properly be applied to commercial announcements solely and clearly aimed at selling products and services * * *." Mr. Banzhaf then requested the Commission to investigate and take appropriate steps to insure that henceforth the station would afford a "corresponding" amount of free time for the presentation of anti-smoking material.

On June 2, 1967, the Commission issued a letter ruling on the Banzhaf complaint (Pet. App. A, 14–17), holding generally that the Fairness Doctrine is applicable to cigarette advertising and emphasizing (Pet. App. A, 15)

> * * * that our holding is limited to this product—cigarettes. Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. In-

[2] In general, the Fairness Doctrine requires licensees to afford reasonable opportunities for the presentation of conflicting views on issues of public importance. The nature and history of the Doctrine are fully discussed in the Brief for the United States and the Federal Communications Commission in *Red Lion Broadcasting Co.* v. *United States* and *United States* v. *Radio Television News Directors Association*, Nos. 2 and 717, this Term, certiorari granted, 389 U.S. 968, 393 U.S. 1014.

> deed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

The Commission refused to require "equal time" for stating the anti-smoking position, stressing, in consonance with the principles underlying the Fairness Doctrine, that "the type of programming and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee * * *" (Pet. App. A, 17). It determined simply that stations which carry cigarette commercials are required to provide "a significant amount of time for the other viewpoint * * *." (Pet. App. A, 16.) By way of illustration it suggested they might discharge their responsibilities by presenting "each week * * * a number of the public service announcements of the American Cancer Society or HEW in this field" (Pet. App. A, 16–17).

With respect to the particular question whether WCBS–TV had discharged its obligations, the Commission noted that the station had broadcast material relating to the health hazards of smoking, and thus "appear[ed] to have a continuing program in this respect." It characterized its letter as a statement of "guidelines * * * so that in connection with the above continuing program you may make the judgment whether sufficient time is being allocated each week in this area" (Pet. App. A, 17).

Numerous petitions for reconsideration were filed by CBS and others including the other major networks, the National Association of Broadcasters, numerous broadcast organizations, the Tobacco Institute, and an advertising trade association. Following consideration of this and other material the Commission, on September 13, 1967, issued a Memorandum Opinion and Order reaffirming its earlier ruling (Pet. App. A, 37–105). The Commission directed that copies of the Memorandum Opinion and Order be mailed to all broadcast licensees, and further specified that its ruling would have prospective effect only (Pet. App. A, 41). Thus, stations' conduct in this area prior to the date of the Memorandum Opinion and Order would not be taken into account in connection with license renewals.[3]

In its Memorandum Opinion and Order the Commission discussed at considerable length the various objections to its ruling that were raised by the parties to the expanded proceeding on reconsideration. *Inter alia*, it rejected contentions that the Fairness Doctrine is unconstitutional and beyond the Commission's statutory authority (Pet. App. A, 42–49). It concluded that, the specifics of the Fairness Doctrine aside, the public interest standard of the Communications Act

[3] Except in the case of the formally promulgated rules relating to personal attacks (under consideration in *United States* v. *Radio Television News Directors Association*, No. 717, this Term, certiorari granted, 393 U.S. 1014), the Commission has never attempted to enforce the Fairness Doctrine otherwise than in its overall consideration of licensee performance when license renewal is sought at the end of the normal three-year license term.

"means nothing if it does not include [the] responsibility" on the part of those who broadcast cigarette commercials to advise their audiences that smoking can be harmful to health (Pet. App. A, 87). And it stressed again that its ruling was "limited to this product—cigarettes" (Pet. App. A, 75), disclaiming any intention "to imply that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance" (Pet App. A, 76).

The court of appeals affirmed, in an opinion by Chief Judge Bazelon, writing for himself and Judge Wright, with Judge Miller dissenting without opinion (Pet. App. B, 1a–40a). The court held that the Cigarette Labeling Act did not preclude the Commission's ruling and that, "as a public health measure addressed to a unique danger authenticated by official and congressional action," the ruling was a proper implementation of the public interest standard of the Communications Act (Pet. App. B, 30a).[4] With respect to the First Amendment objections, the court stated:

> * * * [S]ince the narrow public health power which supports the cigarette ruling does not 'sweep * * * widely and * * * indiscriminately' across protected freedoms, the constitutional question before us is only whether the Communications Act, construed to authorize a public health ruling in the circumstances of this

[4] The court below also rejected Mr. Banzhaf's contention that the Commission should have ordered equal time for anti-smoking messages (Pet. App. B, 38a). Mr. Banzhaf has not sought review in this Court; nor has CBS, the original object of the ruling.

838-573—69——2

case, offends the First Amendment. And whatever the constitutional infirmities of other regulations of programming, we are satisfied that the cigarette ruling does not abridge the First Amendment freedoms of speech or press" [Pet. App. B, 34a; footnote omitted].

ARGUMENT

1. Petitioners' claim that the cigarette advertising ruling is inconsistent with the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282, 15 U.S.C. 1331, *et seq.*, is without substance. The Act requires cigarette manufacturers and importers to print on each pack the warning "Caution: Cigarette Smoking May Be Hazardous to Your Health" (Sec. 4), and provides further that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act" (Sec. 5). Petitioners contend that the Act established a comprehensive program with respect to the smoking-health problem which the Commission has improperly invaded. The court below properly found, however, that "[s]ince the Commission's ruling does not require the inclusion of any 'statement * * * in the advertising of *any cigarettes*,' *but rather directs* stations which advertise cigarettes to present 'the other side' each week, it does not violate the letter of the Act" (Pet. App. B, 7a).

Nor has congressional intent been violated. The "comprehensive program" referred to by petitioners was actually directed, as the Act's title makes plain, only to the relatively narrow question of regulating

"cigarette labeling and advertising." Congress did not purport to inhibit the dissemination, by other means, of information regarding the hazards of cigarette smoking. The court below correctly considered that "Congress may reasonably have concluded that a warning on each pack was adequate *warning*. It surely did not think the warnings were themselves adequate information" (Pet. App. B, 11a–12a). Indeed, Congress sought to promote intensive smoker-education as an alternative to the "drastic step" of requiring health warnings in all cigarette advertising.[5] And both the House and the Senate Reports on the Labeling Act noted and expressly relied on the anti-smoking campaigns of public and private groups as a reason for deferring stronger congressional action.[6] The Commission's ruling, requiring stations which carry cigarette advertising to make general efforts to inform the public as to the possible consequences of smoking, is calculated to foster these goals, and is altogether consistent with the Act.[7]

---

[5] See P.L. 89–156, Title II, Public Health Services, Chronic Diseases and Health of the Aged, 79 Stat. 589, 42 U.S.C. (Supp. II) 241 *et seq.*

[6] See S. Rep. No. 195, 89th Cong., 1st Sess., p. 5 (1965); H. Rep. No. 449, 89th Cong., 1st Sess., pp. 4–5 (1965).

[7] Petitioners rely heavily on the Commission's statement to Congress, prior to passage of the Act, that it then had no plans for regulatory action addressed to the smoking-health problem. This, they argue, deprives it of any authority it would otherwise have to act now in this area. But whatever response Congress might have made if the Commission had then anticipated its cigarette ruling must remain in the area of speculation. No petitioner suggests that the Commission sought to mislead Congress. On the contrary, the basis for Commission inaction at that time was a willingness to defer to the media-wide approach then being proposed by the Federal Trade

In any event, Section 10 of the Act provides that the advertising restrictions will expire on July 1, 1969, so that the question of their impact on what the Commission can require broadcasters to do has virtually no further significance.[8]

2. The court of appeals correctly held that the cigarette advertising ruling was within the Commission's statutory authority and consistent with the First Amendment. The ruling originated in response to the contention that cigarette advertising raises one side of a controversial issue of public importance and therefore that the established principles of the Fairness Doctrine require stations carrying such advertising to make time available for presentation of the contrasting view that smoking may be hazardous to

---

Commission. Enactment of the statute thereafter effectively stalled the Trade Commission. As the court below observed: "If the Act itself does not preempt FCC regulation, we see no reason why the FCC may not take the effects of the Act into account in assessing the need for its own action" (Pet. App. B, 13a, n. 26).

Petitioners also point with horror to the fact that the Commission has proposed, in the event the Labeling Act is not extended, that cigarette advertising be entirely prohibited on radio and television. 34 Fed. Reg. 1959. While such a rule might raise difficult legal questions, the Commission's preliminary statement affords no ground for review in the instant case. Interested parties will have full opportunity to be heard in a rule-making proceeding before the Commission can take any such action, and full right to judicial review if it does so.

[8] To be sure, the Commission will in the future probably be considering, in connection with license renewals, past compliance with the cigarette ruling. But that is no reason for considering now the ruling's consistency with the Labeling Act. It would be time enough to do so if it should develop that any licensee is in fact aggrieved by application of the ruling in a renewal proceeding.

health. In the last analysis, however, both the Commission and the court of appeals considered it irrelevant whether the ruling fits precisely the mold of the Fairness Doctrine as it has developed over the years, and found the basic justification for the ruling—like that for the Fairness Doctrine itself—in the standard of "public interest, convenience, and necessity" that Congress has established as the touchstone of radio regulation.[9] As the Commission stated:

> The licensee, who has a duty "to operate in the public interest" * * * is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it * * *. But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact

[9] See, *e.g.*, 47 U.S.C. 303, 308, 309.

> that the public interest means nothing if it does not include such a responsibility. [Pet. App. A, 87.]

The court below considered that "[w]hatever else it may mean * * * the public interest indisputably includes the public health" (Pet. App. B, 25a). It agreed with the Commission that there is substantial evidence that even in normal use—as distinguished from abuse or use by persons with special susceptibilities—cigarettes pose a danger to health and indeed a danger to life itself. This fact, unique to cigarettes among the products advertised on radio and television, amply justifies a narrow requirement that stations which carry announcements promoting the use of cigarettes must also, through means chosen by the licensee, inform the public of the hazards which smoking may entail (Pet. App. B, 26a–30a). As the court of appeals put it: "We do not think the principle of free speech stands as a barrier to required broadcasting of facts and information vital to an informed decision to smoke or not to smoke [Pet. App. B, 38a]."

Petitioners' attacks upon the Commission's statutory authority to issue the cigarette ruling and upon its constitutionality are premised in large measure upon the proposition that the Commission has no regulatory authority over matters affecting the content of broadcast programming. Petitioners contend that the ruling constitutes impermissible censorship of radio and television advertising and that, conversely, it amounts to impermissible governmental dictation of material that must be broadcast. But neither of these characterizations is correct. As the court of

appeals pointed out, the ruling "neither forbids nor requires the publication of any specific material" (Pet. App. B, 24a); "the responsibility for content, source, specific volume, and precise timing rests with the good faith discretion of the licensee" (*id.* at 30a).

Petitioners' broad objections to the ruling are fundamentally the same as those that are directed against the basic principles of the Fairness Doctrine in the pending cases involving the Commission's implementation of the Doctrine in the area of personal attacks.[10] Their contentions in this regard are answered in our brief on the merits in those cases, and there is no reason for the Court to consider them separately here.

The cigarette ruling, like the Fairness Doctrine generally, is calculated to foster the widest possible debate and dissemination of information on matters of public importance. To be sure, this ruling differs from the normal Fairness Doctrine situation in that the obligation to present anti-smoking material is triggered not by direct statements that smoking is beneficial or not harmful, but by advertising for particular brands of cigarettes which urges their use but presumably makes no direct statement with respect to health. Surely, however, the public interest in being informed is not diminished by the fact that the manufacturer chooses to advance his end of selling cigarettes by the powerful blandishments of advertising

[10] *Red Lion Broadcasting Co.* v. *United States*, No. 2, this Term, certiorari granted, 389 U.S. 968; *United States* v. *Radio Television News Directors Association*, No. 717, this Term, certiorari granted, 393 U.S. 1014.

rather than by factual presentation or rational discussion. Where, as here, one party to a debate (the cigarette manufacturer) has economic interests and resources unmatched by any opponent, and where the public stake in the argument is demonstrably vital, we think the First Amendment and the public interest are served—as they are under the Fairness Doctrine generally—by an attempt to redress the balance.

The features that might be said to distinguish the cigarette ruling from traditional Fairness Doctrine obligations thus create no special problems under the Constitution or the Communications Act. Moreover, the ruling lacks many of the characteristics that the opponents of the personal attack policy and rules have singled out for attack. Unlike the personal attack cases, the instant cases do not involve any requirement that a particular individual be given broadcast time; the manner in which contrasting views are to be presented is left entirely to the discretion of the station licensee. There is here no such obligation of notification and provision of transcripts or summaries as is objected to in the personal attack cases. Nor is there any element whatever of possible uncertainty as to when the reply obligation arises. Moreover, as the court of

appeals noted, the "speech" affected by the cigarette ruling—product advertising—has had a limited status under the First Amendment.[11] Thus, even if the Court were to decide against the Commission in the personal attack cases, it would not follow that there is any impropriety in the cigarette ruling.[12]

CONCLUSION

Because of the relationship between some of the issues in these cases and some of the issues in Nos. 2 and 717, the Court may consider it appropriate to defer ruling upon these petitions until it decides Nos. 2 and 717. However, for these reasons stated, we submit that these

[11] *Valentine* v. *Chrestensen*, 316 U.S. 52; *Breard* v. *Alexandria*, 341 U.S. 622, 642. See also *Head* v. *New Mexico Board of Examiners*, 374 U.S. 424.

[12] The argument is also made that the cigarette ruling is void because the Commission's original letter was sent to WCBS–TV without notice to interested parties or an opportunity for them to be heard. The court below properly answered this contention, pointing out that the Commission subsequently entertained numerous petitions for reconsideration stating the views of broadcasters and cigarette manufacturers, wrote an elaborate opinion justifying its reaffirmation of the ruling and made the ruling prospective only from the date of the order on reconsideration. The court of appeals further rejected the contention that the Commission should have held an oral hearing, properly stating that the premises upon which the order was based were adequately supported by the record and that no showing had been made that any further evidence would have been material.

petitions present no questions that warrant plenary review.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

GREGORY B. HOVENDON,
Attorney.

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

LENORE G. EHRIG,
Counsel,
Federal Communications Commission.

APRIL 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969